

DUE PROCESS PROCEDURES

OVERVIEW

Section 1415 of the Individuals with Disabilities Education Act Amendments of 2004 (IDEA) requires that states provide, as part of their state eligibility documentation, a due process hearing system to resolve disputes between parents of children with disabilities and public education agencies. A due process hearing may be used to resolve any matter relating to the identification, evaluation, placement of a child, or the provision of a Free Appropriate Public Education (FAPE) to the child. Parents, students who have reached the age of majority, or a school may request a due process hearing.

The year 2005 brought about many substantive changes to the due process system both on the federal and state level. IDEA was reauthorized on December 3, 2004 and became effective on July 1, 2005. As part of this reauthorization, the due process hearing system was revamped. Additionally, changes made to Arizona Revised Statutes sections 15-761 and 15-766 eliminated Arizona's two-tier due process system and put in place a one-tier system. Effective August 12, 2005, an Administrative Law Judge at the Office of Administrative Hearing conducts all special education due process hearings.

DUE PROCESS COMPLAINT FILING PROCEDURES

IDEA 04 added a requirement that a party seeking due process must provide a *due process complaint notice* to the other party and to the State Educational Agency (the Arizona Department of Education). This may be done by regular United States mail, fax, or via e-mail. Upon receipt of the request for a due process hearing, the Arizona Department of Education (ADE) will assign a case number and forward the due process complaint notice and supporting documentation to the Arizona Office of Administrative Hearings (OAH). OAH will provide ADE with hearing dates and the name of the appointed Administrative Law Judge (ALJ). The parties are then notified by ADE by way of a "Notice of Hearing" that outlines how the process works, the name of the ALJ, the hearing dates, and other pertinent information. From that point on, all questions and correspondence go between the parties and the assigned ALJ. But note that all amended due process hearing requests are processed through ADE.

The Local Educational Agency (LEA) must inform the parent of any free or low-cost legal services and other relevant services available in the geographic area if requested by the parent, or if a due process complaint is filed. The LEA must also provide Procedural Safeguards Notice (PSN) to the parent once a due process complaint is filed.

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DUE PROCESS COMPLAINT NOTICE

STATUTE OF LIMITATIONS

IDEA 04 added a **2 year statute of limitations** on requests for a due process hearing. That is, the alleged violation for which the party is filing for due process must have occurred not more than 2 years from the date the complainant *knew* or *should have known* about the alleged action. There are exceptions when a parent's delay in filing a request was due to specific misrepresentations of the school or where the school withheld information that was required to be provided to the parent.

CONTENT AND SUFFICIENCY OF DUE PROCESS COMPLAINT

The party filing a due process complaint notice may either use the form found on the Arizona Department of Education website at <http://www.ade.az.gov> in the Dispute Resolution section of the Special Education Program area, or may submit the complaint in a letter. In either format, a due process complaint must contain specific criteria in order to meet the sufficiency requirements set forth in the federal law. The required content of a due process complaint is outlined below.

Content:

At a minimum, a due process complaint must include the following:

1. The name of the child
2. The address of the child's residence
3. The name of the child's school
4. In the case of a homeless child or youth, the child's contact information and the name of the school the child is attending
5. A description of the nature of the problem of the child relating to the proposed or refused action, including facts relating to the problem
6. A proposed resolution of the problem to the extent known and available the complaining party at the time.

Sufficiency:

In order for a due process complaint to go forward, it must be considered sufficient. The due process complaint will be presumed sufficient (*i.e.* that it meets the content requirements above) unless the non-complaining party files a written objection within 15 days of receiving the complaint to both the hearing officer and the other party. The hearing officer has five calendar days to determine if the due process complaint notice meets the criteria set forth in the law and must immediately notify both parties in writing of the determination regarding sufficiency.

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DUE PROCESS COMPLAINT AMENDMENT

Once filed, the due process complaint notice can only be amended if the other party consents in writing (and an opportunity for a resolution session is provided) **OR** by an order of the hearing officer, but not later than five days before the hearing occurs. Hearing timelines recommence when the amended complaint is filed.

LOCAL EDUCATION AGENCY RESPONSE TO A DUE PROCESS REQUEST

IDEA requires that the party against whom due process has been filed must, within 10 days of receiving the complaint, send a response that specifically addresses each issue raised in the complaint. If the LEA is the respondent and it has not already sent a prior written notice to the parent concerning the subject matter of the dispute, the response must include:

1. An explanation of the proposed or refused action;
2. A description of other options considered by the child's Individualized Education Program (IEP) team and the reasons why those options were rejected;
3. A description of each evaluation procedure, assessment, record, or report used as the basis for the proposed or refused action; and
4. A description of other factors relevant to the decision.

Filing a response does not preclude a party from also challenging the sufficiency of the due process complaint notice. Likewise, a challenge to the sufficiency does not extend the timeline for filing a response.

RESOLUTION

RESOLUTION SESSION

Before a hearing may occur, the school must convene a meeting with the parent and the relevant member or members of the IEP team who have specific knowledge of the facts identified in the complaint within **15 calendar days** of receiving the due process complaint notice. The purpose of this meeting – called a resolution session – is for the parties to discuss the complaint and attempt to resolve the issues with the need for a hearing. This meeting must occur unless waived in writing by both parties, or unless both parties agree to mediation. The resolution period is **30 days** from the date the complaint is filed.

The resolution meeting must include a representative of the school who has decision-making authority on behalf of the school, but may not include the school's attorney unless the parents are accompanied by an attorney. The parent and the school determine the relevant members of the IEP team to attend the meeting.

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RESOLUTION PERIOD

The resolution session or a mediation session *must* occur before a due process hearing can be held, unless waived in writing by both parties. If the school has not resolved the due process complaint to the parent's satisfaction within 30 calendar days of receipt of the due process complaint (during the time period for the resolution process), the due process hearing may occur. The 45 calendar day timeline for issuing a final decision begins at the expiration of the 30 day resolution period, or upon the parties agreeing in writing to waive the resolution meeting, or after the resolution meeting or mediation, agreeing in writing that they are unable to resolve the dispute.

If both parties agree to use the mediation process but the matter is not yet resolved, at the end of the 30 calendar day resolution period, both parties may agree in writing to continue the mediation until an agreement is reached. However, if either party withdraws from the mediation process, then the 45 calendar day timeline for the due process hearing starts the next day.

If after making reasonable, documented efforts, the school is not able to obtain complainant participation in the resolution meeting, the school district may, at the end of the 30 calendar day resolution period, request that a hearing officer dismiss the due process complaint. Documentation of such efforts must include a record of the school's attempts to arrange a mutually agreed upon time and place for the meeting, such as:

- Detailed records of telephone calls made or attempted and the results of those calls;
- Copies of correspondence sent to the complainant and any responses received; and
- Detailed records of visits made to the complainant's home or place of employment and the results of those visits. If the school fails to hold the resolution meeting within 15 calendar days of receiving notice of the due process complaint or fails to participate in the resolution meeting, the parent can ask a hearing officer to order that the 45 calendar day due process hearing timeline begins.

RESOLUTION AGREEMENT

If the parties are able to resolve the issues raised in the complaint during the resolution period, they must execute a legally binding agreement, signed by both parties, and enforceable in a state court of competent jurisdiction or in a federal district court. Either party may void the agreement within three business days of its execution.

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DUE PROCESS HEARING

PRE-HEARING CONFERENCE

If the parties have waived the resolution session, or, if after 30 days the issues raised in the complaint have not been resolved to the complainant's satisfaction, the hearing process will commence. Initially, the ALJ will conduct a pre-hearing conference either telephonically or at a location that is reasonably convenient to the parents and the child involved, to determine if the complaint is a legitimate due process complaint, to ensure that all matters are clearly defined, to establish the proceedings that will be used for the hearing, to determine who will represent and/or advise each party, and to set the time and dates for the hearing. [A.A.C. R7-2-405(H)(1)]

GENERAL RIGHTS OF THE PARTIES

Parties have the right to:

- Be accompanied and advised by a lawyer and/or persons with special knowledge or training regarding the problems of children with disabilities;
- Present evidence and confront, cross-examine, and require the attendance of witnesses;
- Prohibit the introduction of any evidence at the hearing that has not been disclosed to that party at least five business days before the hearing;
- Obtain a written, or, at the party's option, electronic, word-for-word record of the hearing; and
- Obtain written, or, at the party's option, electronic findings of fact and decisions.

DISCLOSURE OF INFORMATION

The parties to a due process hearing must disclose all evaluations and recommendations to date that it intends to use at the hearing within **five days** prior to the hearing, or face the possibility of not being allowed to introduce that evidence in the hearing.

PARENTAL RIGHTS AT HEARINGS

The parent must be given the right to:

- Have the child present
- Open the hearing to the public
- Have the record of the hearing, the findings of fact and decisions provided at no cost

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PLACEMENT DURING HEARING

Once a due process complaint is sent to the other party, during the resolution process time period, and while waiting for the decision of any impartial due process hearing or court proceeding, unless the complainant and the school agree otherwise, the child must remain in his or her current educational placement. If the due process complaint involves an application for initial admission to public school, the child, with parental consent, must be placed in the regular public school program until the completion of all such proceedings.

BURDEN OF PROOF

On November 14, 2005, the United States Supreme Court issued its decision in *Schaffer v. Weast*, holding that “The burden of proof in an administrative hearing challenging an IEP is properly placed upon the party seeking relief. In this case, that party is [the student], as represented by his parents. But the rule applies with equal effect to school districts: If they seek to challenge an IEP, they will in turn bear the burden of persuasion before an ALJ.”

HEARING DECISIONS

A final hearing decision must be made not later than 45 calendar days after the expiration of the 30 calendar day period for resolution meetings, and a copy of the decision must be mailed to each of the parties. A hearing officer may grant specific extensions of time beyond the 45 calendar day time period at the request of either party. Each hearing must be conducted at a time and place that is reasonably convenient to the parent and the child.

A hearing officer’s decision on whether the child received a free appropriate public education (FAPE) must be based on substantive grounds. In matters alleging a procedural violation, a hearing officer may find that the child did not receive FAPE only if the procedural inadequacies: interfered with the child’s right to FAPE; or, significantly interfered with the complainant’s opportunity to participate in the decision-making process regarding the provision of a FAPE to the child; or, caused a deprivation of an educational benefit.

A decision made in a due process hearing (including an expedited due process hearing) is final, except that any party involved in the hearing (complainant or school) may appeal the decision by bringing a civil action, as described below.

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EXPEDITED DUE PROCESS HEARING

The parent of a child with a disability may file a request for an expedited due process hearing if he or she disagrees with: (1) any decision regarding placement made under the special education discipline provisions; or (2) the manifestation determination. A school may request an expedited due process hearing if it believes that maintaining the current placement of the child is substantially likely to result in injury to the child or to others.

Unless the parents and the school agree in writing to waive the meeting, or agree to use mediation, a resolution meeting must occur within seven calendar days of receiving notice of the due process complaint. The hearing may proceed unless the matter has been resolved to the satisfaction of both parties within 15 calendar days of receipt of the due process complaint. An expedited due process hearing must be conducted within 20 school days of the date the hearing request is received, and the hearing officer has 10 school days after the hearing to issue a decision.

The student remains in the Interim Alternative Educational Setting (IAES) pending the hearing officer's decision or until the disciplinary period expires, which occurs first, unless the parties agree otherwise.

APPEAL

Any party who does not agree with the findings and decision in the due process hearing (including a hearing relating to disciplinary procedures) has the right to bring a civil action with respect to the matter that was the subject of the due process hearing. The action may be brought in a State court of competent jurisdiction (a State court that has authority to hear this type of case) or in a district court of the United States without regard to the amount in controversy. In Arizona the party bringing the action shall have 35 calendar days from the date of the hearing decision to file a civil action

HEARING OFFICER IMPARTIALITY

In Arizona, "impartial hearing officer" is defined as a person or tribunal assigned to preside at a due process hearing whose duty it is to assure that proper procedures are followed and that rights of the parties are protected. The IDEA sets forth the minimum qualifications for hearing officers, stating that they: (1) must not be an employee of the State Educational Agency or the school responsible for the child; (2) must not have a personal or professional interest that would present a conflict of interest; (3) must have knowledge and understanding of the IDEA and its implementing regulations, state law and rules pertaining to special education, and case law in this area; (4) must be able to conduct hearings in accordance with appropriate, standard legal practice; and (5) must render and write decisions in accordance with appropriate, standard legal practice. Arizona laws mirror these federal requirements.

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For more information on special education due process, please contact:

Dispute Resolution Coordinator
1535 West Jefferson, Bin 24
Phoenix, Arizona 85007
Phone: (602) 542-3084
Fax: (602) 364-0641

Or visit our website: <http://www.ade.az.gov/ess/dispute/dueprocess>

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GLOSSARY OF TERMS AND ACRONYMS USED IN DUE PROCESS

TERMS:

Accommodation: The provisions made to allow the parties and witnesses to attend and give evidence at the due process hearing, including any necessary interpreter, equipment, or physical facilities.

Advisor: An individual with special knowledge or training with respect to the problems of children with disabilities.

Attorney: A lawyer licensed to practice law in the state and who represents parties in a due process hearing.

Petitioner: The party who files the due process complaint with ADE

Due Process Hearing: A fair and impartial administrative hearing conducted by the State Education Agency by an impartial hearing officer through the Arizona Office of Administrative Hearings (OAH) [A.A.C. R7-2-405(A)(1)]

Expedited Due Process Hearing: A due process hearing involving discipline procedures as set forth in the Individuals with Disabilities Education Act.

Administrative Law Judge (“ALJ”): A Judge with the Arizona Office of Administrative Hearings (“OAH”), knowledgeable in the laws governing special education and administrative hearings.

Lay Advocate: A person who is not an attorney, but a person with special knowledge or training with respect to the problems of children with disabilities, and who accompanies and advises parties at a due process hearing.

Mediation: An informal problem-solving process for parents and schools to resolve their differences concerning special education programs through the intervention of a neutral person knowledgeable in matters of special education.

Parent: Any of the following may be considered the “Parent”:

1. Biological or adoptive parent of a child;
2. Foster parent, unless prohibited by State law, regulations or contractual obligations with a State or local entity;
3. Guardian generally authorized to act as the child’s parent, or authorized to make educational decisions for the child (but not the State if the child is a ward of the State);
4. Individual acting in the place of a biological or adoptive parent (including grandparent, stepparent, or other relative) with whom the child lives;
5. Individual who is legally responsible for the child’s welfare;
6. Surrogate parent who has been appointed in accordance with federal regulation

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Public Education Agency (“PEA”): A school district, charter school, accommodation school, state supported institution, or other political subdivision of the State of Arizona that is responsible for providing education to children with disabilities.

Resolution Session: A meeting held by the local education agency with the parent and relevant members of the IEP team prior to the initiation of a due process hearing.

State Education Agency (“SEA”): The Department of Education, Exceptional Student Services Division

Subpoena: A judicial order to appear at a certain time and place to give testimony upon a certain matter. In the context of a due process hearing, a subpoena is used to compel a witness to testify at the due process hearing when that witness will not agree to testify voluntarily.

“Subpoena Duces Tecum”: Literally, “Bring with you”; it is a judicial order to produce documents or papers that are in a person’s possession or control. In the context of a due process hearing, a *subpoena duces tecum* would be requested when a party is seeking copies of documents from a non-party who is not willing to provide copies of such documents voluntarily.

ACRONYMS

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| i. | AAC: | Arizona Administrative Code |
| ii. | ALJ: | Administrative Law Judge |
| iii. | ARS: | Arizona Revised Statutes |
| iv. | ADE: | Arizona Department of Education |
| v. | CFR: | Code of Federal Regulations |
| vi. | ESS: | Exceptional Student Services , Arizona Department of Education |
| vii. | IDEA '04: | Individuals with Disabilities Education Improvement Act of 2004 |
| viii. | OAH: | Office of Administrative Hearings |
| ix. | PEA: | Public Education Agency |
| x. | SEA: | State Educational Agency |
| xi. | USC: | United States Code |